1989

Sew Easy Industries v. David R. Montague : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SEW EASY INDUSTRIES, INC., a Utah corporation,

Plaintiff/Appellant.

vs.

DAVID R. MONTAGUE,

Defendant/Respondent.

No. 890123

146

BRIEF OF APPELLANT

Appeal from a Default Judgment of the
First Judicial District Court
Cache County, State of Utah
Honorable Venoy Christoffersen, District Judge Presiding

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court has jurisdiction over this appeal pursuant to Section 78-1 (a) Utah Code Annotated 1953. The complaint by Sew Easy was originally filed alleging fiduciary breaches of Defendant Montague as a former employee. Montague counter-claimed alleging tortious interference with his new competitive business by Sew Easy, his former employer. This appeal by Sew Easy is from a $50,000 default judgment entered against it on Montague's counter-claim. Montague procured an ex-parte default from the clerk on the counter-claim on the grounds that Sew Easy had failed to answer process or appear. Sew Easy filed a written reply even though the complaint was a reply and the case continued normal prosecution as though no default had been entered. The discovery proceeded until interrupted by a motion to compel discovery and a counter-motion for a protective order, but the Judge never ruled on the motions. After Sew Easy sued the Judge in an unrelated matter and their counsel caused the Judge to be found in contempt of the Supreme Court, the Judge issued an order show cause why the suit should not be dismissed for lack of prosecution. Sew Easy failed to appear and the Judge, rather than dismiss the suit as noticed, bifurcated the suit, dismissed the complaint, entered an order and judgment of default for $50,000 against Sew Easy on the counter-claim without any evidentiary

hearing on either the claimed default or the amount of the unliquidated damages. From the time of the ex-parte dismissal-unnoticed default judgment hearing to the time of entry of the default judgment, the court entered Montague's proposed default order before Sew Easy's timely objections were filed and then waited until after Montague's untimely reply to objections was filed and then entered the default judgment without ruling on the objections. No evidentiary hearing on the amount of the unliquidated damages was held. Sew Easy was never given formal notice of entry of the default judgment and had not received either constructive or actual notice of the entry of the default judgment until less than 30 days before the filing of this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the default judgment erroneous and void as a matter of law and entered in violation of due process of law because the procedures leading to its entry violated the procedural rules and because the Judge was acting under the burden of implied and express malice against Sew Easy and its counsel?

2. Was the default judgment also void because no evidentiary damage hearing was held to liquidate and determine the amount of the alleged tortious interference damages suffered?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States, Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction** the equal protection of the laws.

Constitution of Utah, ARTICLE I Section 7 [Due process of law.] No person shall be deprived of life, liberty or property, without due process of law.

Utah Rules of Civil Procedure. Rule 5. Service and Filing of Pleadings and Other Papers. (a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, **every pleading subsequent to the original complaint unless the court otherwise orders** because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, **every written motion other than one which may be heard ex parte,** and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper **shall be served upon each of the parties. No service need be made on parties in default for failure to appear** except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4....

(b) **Service: How Made.** (1) **Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; of, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing....**

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

Utah Rules of Civil Procedure. Rule 7. Pleadings Allowed; Motions and Orders. (a) OMITTED

(b) Motions, Orders and Other Papers. (1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) Orders. An order includes every direction of the court including a minute order made and entered in writing and not included in a judgment. An order for the payment of money may be enforced by execution in the same manner as if it were a judgment. Except as otherwise specifically provided by these rules, any order made without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice.

Utah Rules of Civil Procedure. Rule 55. Default.... (b) Judgment. Judgment by default may be entered as follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Utah Rules of Civil Procedure. Rule 58A. Entry....

(d) Notice of signing or entry of judgment. The prevailing party shall promptly give notice of the signing

or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

Rules of Practice--District and Circuit Court. Rule 2.9. Written orders, judgments, and decrees. (a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and/or orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. **Notice of objections thereto shall be submitted to the court and counsel within (5) days after service.**

STATEMENT OF THE CASE

The Plaintiff, hereafter "Sew Easy" filed the complaint against the defendant, hereafter "Montague" alleging that he breached fiduciary obligations as a former employee in starting a competitive business and intentionally interfered with a Sew Easy supplier (R. pgs. 1 - 3). Montague eventually answered and counter-claimed in verbatim reverse that Sew Easy had interfered with the same supplier to his new competitive business, a claim inherently denied on the face of the complaint not requiring any other reply under the rules (R. pgs. 16 - 18). Montague, the **defendant** without filing the required motion or giving notice, went ex-parte to the clerk on the **false pre-text** that Sew Easy, the **plaintiff** was a non-appearing party **defendant** not entitled to notice who had defaulted in answering **an original summons**. Montague in this manner obtained from the

clerk the entry of a void ex-parte default on the counter-claim (R. pgs. 21 - 22). After receiving a copy of the entered ex-parte default, Sew Easy filed another reply (R. pgs. 30-31). The parties proceeded into interrogatories and depositions as though the erroneous default was void and of no effect. The prosecution of the case was blocked by the judge's continuing refusal to rule on a motion to compel discovery and a counter-motion for a protective order (R. pgs. 32 - 35).

Long after the judge should have timely ruled on the motions, the same judge in an unrelated case was found, by the Court of Appeals, to have been in long term contempt of a Supreme Court order for his suppressing of a transcript. Sew Easy's counsel procured the contempt finding (R. pgs. 104a - 115a). Shortly before the contempt finding, Sew Easy also through the same counsel, added the judge as a defendant for injunctive relief in an unrelated civil rights action in Federal Court. Thereafter, without ruling on the pending discovery motions, the judge sua sponte ordered a hearing to show cause why the suit should not be dismissed for lack of prosecution, **which he was then obstructing.** The show cause order specified that a party's failure to appear constituted concurrence in dismissal of the suit. Sew Easy's written objections to dismissal were delivered late to the court because of clerical error in mailing rather

impaired operating cash, gave stop work instructions to subordinates, converted trade secrets, etc. and others (R. pgs. 1 - 3). Montague's eventual answer after denial of a motion to dismiss included a compulsory counter-claim that Sew Easy had tortiously interfered with business relationships in its futile attempts to rehabilitate the alienated key supplier on a non-exclusive basis to mitigate their damages (R. pgs. 16 - 18). The counter-claim was in verbatim reverse to the complaint's interference allegations.

3. Ex-Parte Default - Reply: In between discovery proceedings, Montague presented an ex parte a Precipe for default to the court (R. pgs. 21 - 22). The clerk signed and entered the Default without the required motion or notice. The ex-parte default included a false finding that Sew Easy had been served with process and failed to appear and answer defendant's counter-claim (R. pgs. 19 - 20). Sew Easy then incorporated in another "reply" the denial inherent in its complaint (R. pgs. 30 - 31) reinforced by defenses raised in a deposition and answers to interrogatories (R. pgs. 32-35).

The case then proceeded as though there was a reply until after the dismissal of the suit for lack of prosecution.

4. Sua Sponte Dismissal: The court arbitrarily and prematurely issued an order to show cause on September 13, 1988 why the suit should not be dismissed for lack of prosecution (R. pgs. 51 - 52). The court itself had blocked prosecution by failure to rule on discovery motions which had been ripe for ruling for over nine months and were never ruled on by the court (R. pgs. 48 - 50.).

The order to show cause expressly provided that failure to appear would be considered a consent to dismissal of the suit (R. pgs. 51 - 52).

Sew Easy elected to appear by written objections and by reviving court blocked discovery but a clerical error of mailing rather than hand delivery resulted in Sew Easy's failure to appear. The resulting court dismissal order was never served on Sew Easy (R. pgs. 50).

Sew Easy on oral notice of the dismissal elected to re-file the complaint after the judge's announced retirement in order to avoid a confrontation over disqualification, Rule 60B U.R.C.P. and other possible corrective motions (R. pgs. 94a - 99a).

5. Spurious Default Judgment Proceedings after Dismissal: The show cause hearing was held and dismissal was ordered on September 26, 1988 (R. pg. 53). The day following, on September 27, 1988 Montague's counsel prepared and submitted to the judge and mailed to Sew Easy an

affidavit regarding costs and attorney's fees, and also on that same day submitted the form of an order dismissing the complaint which had already been dismissed by minute order. The proposed order also contained an order for the clerk to enter a default judgment on the counter-claim in the amount of $50,000 plus fees and costs (R. pgs. 65 - 66). On September 29, 1988 the judge signed the order, but no copy of the signed order was mailed to Sew Easy. The clerk then entered that order of default on the 29th of September, 1988 and no notice was given of the clerk's entry of said default order (R. pg. 67).

Sew Easy, who had been served with the proposed order and affidavit on September 27, 1988, by mailing, filed an objection to the entry of the default judgment on the counter-claim on September 30, the date of the receipt in the mail of the proposed counter-claim default order. However, it was a day after the judge had signed the said default order reciting the suit dismissal hearing as justification.

Montague also mailed to the Plaintiff a proposed form for default judgment on September 27, 1988 which was also received by Sew Easy on September 30, 1988 (R. pgs. 73 - 74). However, the proposed form for the default judgment was not filed with the court until October 3, 1988, which was three days after Sew Easy filed its objections to entry

of the default order (R. pgs. 68 - 69). The judge took no action with respect to the default judgment until after he received Montague's dilatory response to plaintiff's objection to entry of default judgment on counter-claim (R. pgs. 70 - 72). It was later discovered that on October 26, 1988, the day after the judge received Montague's response to the objections, he signed the default judgment, striking out its typed in date of the 27th of September, 1988 and writing in the 26th of October, 1988.

6. No Damage Hearing - No Notice of Default Order or Judgment Entry: Subsequent to that October 25th Montague reply, both Sew Easy and Montague because, they received no notice to the contrary, waited again as though the Judge was simply totally defaulting as he had done on the discovery motions with no ruling on either the motion or objection. Sew Easy also knew that in the worst of all cases they were entitled as a matter of law and under the well-known practice of this judge to an evidentiary hearing fixing the unliquidated and unprovable damages before there was a final appealable default judgment.

7. Timely Notice of Appeal - Cost Bond and Docketing Statement: Sew Easy first discovered on March 8, 1989 from examination of the file that the Judge had entered this default on October 25, 1988, the same day Montague's reply

was filed. (R. pgs. 94a - 98a). Sew Easy filed its notice of appeal on April 20, 1989.

SUMMARY OF ARGUMENTS

The great risk in arguing this case is that the cumulative gross errors and denials of due process resulting in the entry of this default judgment on an unliquidated compulsory counter-claim are so numerous, outrageous and unbelievable that the credibility of the messenger is instantly suspect to the serious judicial mind. The conclusion appears inescapable that Montague's counsel was aware that there were no limits on his raw power to obtain from the biased judge the progressive ex-parte orders necessary to his nefarious purposes of obtaining an ex-parte judgment without any notice or opportunity to be heard and denying Sew Easy its day in court on the counter-claim issues. It appears likely that Montague's counsel acted with increasing confidence that the judge was out looking for an opportunity to break all the rules to retaliate against Sew Easy and its counsel for the embarrassing Hardy fiasco and the Sew Easy civil rights case against the judge. The claim of due process denying absurdities begins with an ex-parte "precipe for default" against a represented party plaintiff resulting immediately in the entry of an ex-parte default against the plaintiff on the counter-claim which had been substantively replied to. Due process required a

motion, right to oppose and argue the claimed default, which at worst would have resulted in an order to file another reply. The judge while refusing to rule on the proper motions on discovery, and after being sued and found in contempt concurrently ordered a show cause hearing for, dismissal of the "case" for lack of prosecution to clear it from his calendar which would have been a welcomed relief to Sew Easy. The judge violated the scope of his own order. He used Sew Easy's inadvertent non-appearance as a springboard to entry without prior or subsequent notice of (1) a dismissal of the complaint only; (2) then ordered a default judgment on the counter-claim; (3) then weeks later entered the default judgment on an unliquidated compulsory counter-claim for a rounded $50,000.00 plus costs and attorney's fees for "tortious interference" without the required evidentiary damage hearing. This is perhaps the clearest case imaginable of the denial of a right to a day in court to present evidence before the taking of property under the color of authority of the state.

ARGUMENT

I. THE JUDGE'S IMPLIED MALICE ALONE WOULD VOID THE JUDGMENT AND WHEN ADDED TO THE OTHER GROSS PROCEDURAL ABORTIONS EVINCES AN OUTRAGEOUS DENIAL OF DUE PROCESS AND A MALICIOUS COURSE OF JUDICIAL MISCONDUCT.

Even if arguendo, all the patently extra-legal procedures had been regular that led to the default

judgment, it was a gross denial of due process for Judge Christoffersen to act in this case. Sew Easy's counsel had caused the judge to be found in contempt of the Supreme Court with a spin off civil rights action against the judge by counsel and the plaintiff, with the same counsel, had sued the judge for injunctive relief in another unrelated civil rights action.

The fact that the judge also repeatedly violated the procedural rules, always to the prejudice of Sew Easy, and always to the benefit of Montague, becomes powerful and perhaps conclusive circumstantial evidence that the judge was driven by express malice against Sew Easy and its counsel.

See Haslam v. Morrison, 113 Utah 14, 190 P.2d. 520; 46 Am. Jur. 2d. Judges Sec. 86.

II. THE DEFAULT JUDGMENT ON UNLIQUIDATED DAMAGE COUNTER-CLAIM IS VOID FOR LACK OF THE REQUIRED DAMAGE EVIDENTIARY HEARING.

The default "judgment" is void on the separate grounds that that the trial court failed to follow Rule 55 (b) (2) of the Utah Rules of Civil Procedure in entering the judgment. That rule as applied by this Court clearly requires that, where default judgment is for other than a sum certain or an amount that by computation can be made certain, a hearing had to be conducted by the trial court to ascertain the amount of the damages to which the defendant

was entitled. Russell v. Martell, 681 P. 2d. 1193 (Utah 1984); Pitts v. Pine Meadow Ranch Inc., Utah, 589 P. 2d. 767 (1978) and J.P.W. Enterprises, Inc. v. Naef, Utah, 604 P. 2d. 486 (1979). The record is clear that such a hearing is required and that none noticed or held. This variance is an independent grounds for summary reversal and in other cases the same judge has always required the damage evidentiary hearing.

III. THE DEFAULT - THE ORIGINAL DEFAULT, THE DEFAULT ORDER AND DEFAULT JUDGMENT WERE ALL VOID AND VIOLATED DUE PROCESS.

The face of the record facts as detailed reveals the application of a specious but popular local doctrine of judicial interpretation of procedural and other rules in order to infinitely enlarge the judicial discretion and convenience of the judge or a "favored" party, even though the other party's rights may be adversely affected by the judicially self-serving interpretation.

The applications of this specious local doctrine are legion in the record of this case. It was no offense to the judge that Montague's counsel procured the ex-parte first default entry from his clerk on the (false, pre-textual) grounds that Sew Easy had failed to answer process and failed to appear. The doctrine reasons that this innocent error was not a "material" variance from the rules and promotes judicial efficiency. The local doctrine holds that

objections to be filed. Then after timely objections were filed, the judge ignored the requirement of first ruling on the objections. Then upon receipt of the very dilatory reply he immediately signed and entered the well rounded $50,000.00 tort based default judgment without an evidentiary hearing or ruling on the objections. The popular local "justification" includes notions that unless a rule or statute specifies that a procedural step is absolutely required then it is in the discretion of the judge, or that laws mean what "the judge" subjectively interprets them to mean and nothing more or less. Significantly, every one of the above variations was prejudicial to Sew Easy and in favor of Montague.

It is clear by controlling "objective judicial interpretation" that all of the above specified procedural acts violated Sew Easy's rights to its "due process day in court." The notion that the judge is free to apply a meaning to the rules other than their plain meaning under rules of construction and as interpreted by this court, so the judge can either vent his malice or exercise unbridled kingly discretion, is absurdly erroneous and is more anti-American than a Russian Ruble. Every specified variance denied Sew Easy its fundamental right to notice, opportunity to be heard and present evidence and argument before the court "deprives it of its property." These fundamental

there are no requirements that the judge ever rule on discovery motions or that there are any time requirements for ruling because it is not "material" and not absolutely required under his interpretations. The spurious doctrine further reasons the court may sua sponte order dismissal of less than the whole suit even though it is obstructing prosecution and even though its notice specifies that the whole suit will be dismissed.

The popular doctrine also holds that regardless of the nature or extent of intervening conflicts or grounds for recusal the judge may "discretionarily" stay in the case simply because the party has the alternative remedy of moving for disqualification, and concludes that his "hanging-in" certainly promotes judicial efficiency and economy. Sew Easy complains that the judge's ex-parte expansion of the suit dismissal hearings purpose from suit dismissal as noticed, to include bifurcation, partial dismissal, entry of a default order and judgment on the counter-claim, all without notice or hearing, are all extra legal. This complaint is viewed locally as an immaterial ACLU-type due process technicality contrary to judicial convenience and economy.

The spurious doctrine also allowed the judge to sign the proposed default order the day before Sew Easy received the proposal and five days before the rules allowed

rights of Sew Easy which were violated here are implemented by the Utah Rules of Civil Procedure.

In order to dispel any notion that may exist as to whether the violated procedural rules hereafter discussed are to be interpreted to protect Sew Easy or for the convenience and economy of the court under Cache County local de facto practice we cite the following due process based rules of construction. The sum of the due process and U.R.C.P. rules violations, as later detailed, is incredible in this case and the following sets the stage for application of due process interpretations to those rules:

> "In general, when the sovereign has established rules to govern its own conduct, it will be held to the self-imposed limitation on its own authority, departure from which denies due process of law."

This citation is from 16C C.J.S. Con. Law Sec. 969 pgs. 265 & 266 citing Layton v. Swapp, D.C. Utah 484 F. Supp. 958, above which is noted:

> "Implicit in concept of due process are ideas that government must follow its own rules and that it must do so within reasonable time."

The compulsory nondiscretionary nature of the sovereign's duty to follow its own rules is highlighted by a continuation of the same C.J.S. citation at page 266.

> "and where a state has established procedure which comports with due process, state and local officials are bound to follow those procedures." (Citing Wolf v. Lillie v. Kenosha County Sheriff, D.C. Wis., 504 F. Supp. 1 vacated on other grounds C.A.)

The popular notion in Cache County that rules are to be interpreted for the convenience and efficiency of the sovereign judge or his favored parties is dispelled with finality by this court in the case of Deseret Savings Bank vs. Francis, 62 Utah 85, 217 P. 114 (1923) and quoting from Supervisors vs. U.S., 4 Wall 435, 18 L.Ed. 419 as follows:

> "The conclusion to be deduced from the authorities is that, where power is given to public officers, in the language of the act before us, or in equivalent language--whenever the public interest or individual rights call for its exercise -- the language***though permissive in form, is in fact peremptory. What they are empowered to do for third person the law requires shall be done. The power is given, not for their benefit, but for his.
> It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."
> "In all such cases it is held that the intent***which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"
>
> Again, from Corpus Juris Secundum:
>
> "The due process clause require that a power conferred by law be exercised judiciously with an honest intent to fulfill the purpose of the law and it is a part of the judicial function to see that the requirement is met..." (16C C.J.S. Con. Law Sec. 967 pg. 254)

This court has clearly declared in harmony with the due process concept that a party is entitled to his day in court on the merits of a counter-claim and unlike other judgments and orders, this court gives no presumption of validity to default judgments and resolves all doubts in favor of setting aside default judgments and giving a hearing on the merits. This due process "day in court" rule is found in Heathman v. Fabian & Clendenin, 377 P.2d. 1189:

> "Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case."

See also Locke v. Peterson, 285 P.2d. 111 and Utah Commercial and Savings Bank v. Trembo, 17 Utah 198 53 P. 1033.

The Court's order to show cause for dismissal for lack of prosecution issued while the judge was blocking prosecution by his refusal to rule on discovery motions for over nine months is a gross due process violation. It also evinces judicial malice. However, if he had dismissed the whole suit as he gave notice he would do, there would have been no material prejudice, rather a significant benefit. A new complaint filing would have solved many of the rulings

defaults and disqualification problems faced by Sew Easy with this retiring judge.

The fact that the judge expanded the noticed purpose of the show cause hearing into an unnoticed hearing on a phantom motion to enter a counter-claim default judgment is but further evidence of his active malice. That kind of judicial trickery is clearly beyond the authority of the court and an affront to the judicial process. A sua sponte dismissal for lack of prosecution to clear the calendar must be construed as a dismissal of the dependent compulsory counter-claim as well. After such dismissal of the case, the court clearly lost jurisdiction for the purpose of rendering any default judgment for either party: 21 C.J.S. Courts Sec. 94; Nichols v. State, 554 P. 2d. 231; Lund v. Third Judicial District Court, 62 P. 2d. 278; Wasatch Oil Refining Co. v. Wade, 63 P. 2d. 1075. This attempted discriminatory dismissal is especially aggravated because the court, burdened with malice, used the dismissal as a pretext and springboard for entering the default order and default judgment without motion, notice or opportunity for hearing.

The proceedings that led to the original default and post-dismissal entry of the order for default and default judgment all violated the Utah Rules of Civil Procedure and due process in the following particulars:

The plaintiff was never in default in reply to the counter-claim for tortious interference with the supplier. The complaint was, in law and substance, "a reply" to the counter-claim so there was no failure to plead or otherwise defend under Rule 55 (a)(1) U.R.C.P. The complaint inherently denied and replied to that reversed counter-claim. Any additional reply would in substance have been no more than a complaint amendment. Wells v. Wells, 272 P. 2d. 167 (Utah 1954). Under the circumstances where there had been a complaint, answer and counter claim and discovery was active on issues in dispute, no default could be entered by the clerk or the court under Rule 55 (a) U.R.C.P. until the active adverse party was by motion and notice given his opportunity to contest the claimed fact of a claimed default under Rule 7 (b) (1) U.R.C.P. Montague in both the pre and post dismissal default proceedings would had to have given notice under Rule 5 (a) U.R.C.P. Both the original precipe and first default also falsely stated the record facts regarding the nature of the claimed default and falsely made it appear that Sew Easy, **the plaintiff, was a defendant who** had not responded to "process" as the pretext for the outrageous ex-parte default entry.

CONCLUSION

On the grounds that the default judgment was void because its entry was based upon outrageous multiple violations of the rules and due process, this court should vacate the default judgment and confirm that the case was dismissed without prejudice leaving the parties free to litigate the claims and counter-claims in another action which will be filed before this appeal is heard.

Signed this 11th day of August, 1989.

David R. Daines
Attorney for Plaintiff/Appellant

DM-SC10

CERTIFICATE OF SERVICE

I hereby certify that I mailed four exact copies of the foregoing Brief of Appellant postage prepaid in Logan, Utah to Brad H. Bearnson, 56 West Center, P. O. Box 525, Logan, Utah 84321, this 11th day of August, 1989.

David R. Daines